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High School Athletics and Due Process: Notice of Eligibility Rules

Teare v. Board of Education, No. CV77-L-190 (D. Neb. Sept. 16, 1977); *Compagno v. Nebraska School Activities Association*, No. CV77-L-192 (D. Neb. Sept. 16, 1977).

I. INTRODUCTION

Teare v. Board of Education[1] and *Compagno v. Nebraska School Activities Association*[2], decisions issued by Chief Judge Urbom in the United States District Court for the District of Nebraska, should be of interest to every attorney and school official associated with high school athletics. These companion cases involve the related issues of whether participation in high school athletics is an interest protected by the due process clause of the fourteenth amendment and, if so, whether the notice of eligibility rules provided in each instance satisfied the requirements of that constitutional protection.[3]

Teare and *Compagno* are significant for several reasons. They extended due process protection to a single specific segment of the total educational program which is generally provided in a secondary school. The discussions of the factors which should be considered and the standards which should be applied in determining what process is due provide excellent guidance for school officials. Furthermore, these cases illustrate an application of due process considerations relative to the *access to* as contrasted with the *removal from* an educational program or activity.

1. No. CV77-L-190 (D. Neb. Sept. 16, 1977) (memorandum and order denying preliminary injunction).
2. No. CV77-L-192 (D. Neb. Sept. 16, 1977) (memorandum and order denying preliminary injunction).
3. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192 (D. Neb. Sept. 16, 1977), also involved claims of violations of equal protection and the right to travel; however, these allegations of constitutional violations were rejected by the court with only a brief discussion, and the specific resolutions of these claims are not discussed in this casenote.

II. FACTS

John Teare and Vincent Compagno, the plaintiffs in the separate actions, were ruled ineligible to participate on the varsity football teams of their respective schools at the beginning of the 1977 season. The rules under which the two students were determined to be ineligible were established and promulgated by the Nebraska School Activities Association,[4] of which each school was a member. The Association was the defendant of record in *Compagno* and an intervening defendant in *Teare*.[5]

The facts of *Teare* established that John Teare moved with his family to Grand Island, Nebraska, prior to the beginning of the 1975-76 school term, which was his sophomore year. Upon entering Grand Island High School, he was provided orientation material which included a student handbook. A revised handbook was reissued to all students at the beginning of the 1976-77 school year.[6]

Both versions of the handbook contained an entry under the heading "Athletics" in substantially the following language:

> Grand Island Senior High School is a member of the Nebraska High School Activities Association. A student who participates in any inter-school contest (athletics, music, speech, etc.) must conform to the eligibility requirements of this association. The school has additional requirements which must be observed. The requirements for participation are as follows: (1) Good citizenship. (2) Passing in at least 15 hours of work each semester.[7]

Also included in the handbook was rule 1(b) of the by-laws of the Nebraska School Activities Association which provides:

> A student shall have credit on the school records for fifteen semester hours of school work for the immediate preceding semester. The term "preceding semester" means the semester immediately preceding the semester in which the student wishes to participate in athletics.[8]

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4. The Nebraska School Activities Association is a voluntary organization of Nebraska schools, which has the purpose of promoting and regulating the competition between schools in extracurricular activities. The program of activities for Nebraska schools is recommended by the State Board of Education, but the rules and regulations governing interscholastic competition are made by the members of the Association. NEBRASKA SCHOOL ACTIVITIES ASS'N, FORTY-THIRD ANNUAL YEARBOOK (1977-1978).
5. It has been established that for purposes of such litigation state school activities associations act under color of state law and are subject to suit. Wright v. Arkansas Activities Ass'n, 501 F.2d 25, 28 (8th Cir. 1974); Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1295 (8th Cir. 1973); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1157 (5th Cir. 1970).
6. Teare v. Board of Educ., No. CV77-L-190, slip op. at 2.
7. *Id.*
8. NEBRASKA SCHOOL ACTIVITIES ASS'N, *supra* note 4, at 15. *See* Teare v. Board of Educ., No. CV77-L-190, slip op. at 2.

Teare neither acknowledged nor denied receipt of the second handbook. He did testify that upon receiving the 1975-76 handbook he had read a section on athletic letter requirements, but that he had not read the eligibility provision and was unaware of the preceding-semester rule. He did admit knowing that athletic participation was conditioned on some rule relating to academic standing.[9]

During the second semester of his junior year, Teare failed two courses and did not earn fifteen hours credit. He was therefore ineligible under the preceding-semester rule to participate in athletics during the fall semester of the 1977-78 school year. He was never specifically informed of that fact after his credit for the spring semester had been established.[10] Teare participated in the summer conditioning program and the official practices when they began, and his performances indicated that he would start on the varsity team. Prior to the first game he was notified by the coach of his ineligibility.[11] Teare brought suit arguing that his exclusion from the team was a denial of due process because he was not given advance warning of the provisions of the rule, and because he was not given notice of his loss of eligibility until it was too late for him to regain it; he emphasized he could have done so by attending summer school had he been informed of his ineligibility at the end of the spring semester.[12] He did not challenge the preceding semester rule itself.

The facts of *Compagno* established that Vincent Compagno moved with his family to Omaha, Nebraska, about March 1, 1977, and enrolled at Creighton Preparatory High School, a private parochial school, to complete his sophomore year. He went out for the 1977 football team, but before the first game he was informed that he was not eligible to participate in varsity competition because of a Nebraska School Activities Association ruling.[13]

The ruling was based upon article I-R of the Association bylaws. Section 4(b) of that article states:

> If any student changes schools without an accompanying change of residence on the part of parents . . . . the student shall be ineligible to compete in athletics in the school of the place to which he/she has

9. Teare v. Board of Educ., No. CV77-L-190, slip op. at 2.
10. *Id.*
11. *Id.*
12. *Id.* at 3-4.
13. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 1.

> moved until he/she has been in attendance at that school for a period of one semester (90 school days).[14]

Section 4(a) states: "Residence shall be defined as the place where one has established his/her home, the place where the student is habitually present, and to which, when departing, the student intends to return."[15]

The residence rule in section 4(b) has been interpreted to mean that no student may participate in athletics if the school which he attends is in a different public school district than the one in which his parents reside.[16] The Compagno family lived in the Millard school district, while Creighton Prep, the school that Compagno attended, is in School District 66. Although the officials of Creighton Prep were aware of both the rule and its interpretation, Compagno was aware of neither until he was informed of his ineligibility.[17]

Compagno then brought suit alleging violations of his constitutional rights protected by both the due process and equal protection clauses of the fourteenth amendment.[18]

Teare and *Compagno* came before the court on motions for preliminary injunctions.[19] The established standard for the issuance of a preliminary injunction requires the moving party to show both a substantial probability of success at trial and an irreparable injury if the injunction is not issued.[20] Both motions for preliminary injunctions were denied. Teare failed to show a substantial probability of success on the merits of his claim;[21] while Compagno failed to show the probability of success on the merits because of the insufficiency of the evidence produced.[22]

III. DUE PROCESS

The common theme of *Teare* and *Compagno* is procedural due process. Two issues were analyzed: whether a constitution-

14. NEBRASKA SCHOOL ACTIVITIES ASS'N, *supra* note 4, at 17. *See* Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 1.
15. NEBRASKA SCHOOL ACTIVITIES ASS'N, *supra* note 4, at 16; Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 2.
16. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 2.
17. *Id.*
18. *Id.* at 2, 5.
19. *Id.* at 2; Teare v. Board of Educ., No. CV77-L-190, slip op. at 2. A temporary restraining order had previously been entered in *Teare. Id.*
20. Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 392 (8th Cir. 1976).
21. Teare v. Board of Educ., No. CV77-L-190, slip op. at 2, 6.
22. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 4, 6.

ally protected interest was involved and, if such an interest was at stake, whether the process due was provided.

Since the decisions in *Teare* and *Compagno*, the United States Supreme Court has decided *Board of Curators v. Horowitz*.[23] Although *Teare* and *Compagno* probably would have been decided the same, *Horowitz* is certain to have a significant effect on any future due process analysis in which a student's participation in an educational program is at issue.

A. The Interest Protected

In determining whether due process requirements apply, the interest at stake must be examined to see if it is within the protection of the due process clause.[24] "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property."[25]

The question of whether participation in high school athletics involves interests protected by the fourteenth amendment has been considered by a number of courts, both federal[26] and state.[27] The courts had consistently refused to extend fourteenth

23. 98 S. Ct. 948 (1978). *Horowitz* involved the academic dismissal of a student from a university medical school. The Court assumed that a protected interest was involved, and found that the procedures followed had sufficiently met due process requirements. The school had fully informed the student of the dissatisfaction with her progress and the possible consequences, and the dismissal decision was made carefully and deliberately. *Id.* at 952. The decision is significant in that it distinguishes between the "far less stringent procedural requirements" for academic evaluations and the due process requirements for disciplinary proceedings established in Goss v. Lopez, 419 U.S. 565 (1975).
24. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).
25. *Id.* at 569.
26. *See, e.g.*, Hamilton v. Tennessee Secondary School Athletic Ass'n., 552 F.2d 681 (6th Cir. 1976); Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Walsh v. Louisiana High School Athletic Ass'n, 428 F. Supp. 1261 (E.D. La. 1977); Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976); Dallam v. Cumberland Valley School Dist., 391 F. Supp. 358 (M.D. Pa. 1975); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974); Moran v. School Dist. #7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Paschal v. Perdue, 320 F. Supp. 1274 (S.D. Fla. 1970); Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).
27. *See, e.g.*, Beeson v. Kiowa County School Dist. RE-1, — Colo. App. —, 567

amendment protections to participation in these activities, except in instances in which racial discrimination was involved.[28] The federal courts had found no protected civil rights at stake[29] while the state courts had viewed such activities as privileges subject to any reasonable regulation.[30]

A new theme of litigation began to emerge in the early 1970's as the rational basis test of the equal protection clause was invoked to protect the rights of female[31] and married students[32] against arbitrary discrimination which excluded them from participation in high school athletics. *Reed v. Nebraska School Activities Association*,[33] which struck down a rule prohibiting a female from playing on her school's only golf team, established that the issue was not whether there was a right to participate in these activities, but rather whether there was a right for females to be treated the same as males unless a rational basis existed for treating them differently.[34]

Reed was in the vanguard of a substantial number of equal protection cases in which discriminatory rules were struck down, not because athletic participation was in itself a constitutionally protected interest, but because the classifications made

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P.2d 801 (1977); Sturrup v. Mahan, 261 Ind. 463, 305 N.E.2d 877 (1974); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972); Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685 (Ky. App. 1977); Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774 (La. 1975); Bruce v. South Carolina High School League, 258 S.C. 546, 189 S.E.2d 817 (1972); Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 425 S.W.2d 597 (1968).

28. *See, e.g.*, Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).
29. Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963). *Contra*, Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968). In *Kelley*, the court found that a one-year suspension of a high school from interscholastic athletics involved a protected right or interest of the students; however, this would no longer seem to be good law in that circuit in view of Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681 (6th Cir. 1976), in which it was found that participation in athletics is not a protected interest.
30. *See, e.g.*, Bruce v. South Carolina High School League, 258 S.C. 546, 189 S.E.2d 817 (1972); Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 425 S.W.2d 597 (1968); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).
31. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).
32. Moran v. School Dist. #7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972).
33. 341 F. Supp. 258 (D. Neb. 1972).
34. *Id.* at 262. It should be noted that *Reed* was decided by Judge Urbom, the same judge who heard *Teare* and *Compagno*.

by state associations and schools were not rationally related to the purpose of the particular rule being considered.[35]

Brenden v. Independent School District 742,[36] following what was essentially the *Reed* analysis,[37] held that a rule prohibiting females from participating with males in certain non-contact sports on the school's only team violated the equal protection clause. Perhaps significantly, the Eighth Circuit Court of Appeals did conclude in *Brenden* that the "interest in participating in interscholastic sports is a substantial and cognizable one."[38] But *Brenden* did not reach the specific issue of whether participation in high school athletics was of sufficient constitutional interest to invoke the protections of the due process clause. The three federal circuit courts of appeal which have considered that specific issue have held that such participation is not a constitutionally protected interest.[39] This majority view is clearly stated in *Hamilton v. Tennessee Secondary School Athletic Association*:[40]

> For better or worse, the due process clause of the fourteenth amendment does not insulate a citizen from every injury at the hands of the state. "Only those rights, privileges and immunities that are secured by the Constitution of the United States or some Act of Congress are within the protection of the federal courts. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the States." The privilege of participating in interscholastic athletics must be deemed to fall in this latter category and outside the protection of due process.[41]

At least one state appellate court has recently reached the

35. *See, e.g.*, Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774 (La. 1975).
36. 477 F.2d 1292 (8th Cir. 1973).
37. *Id.* at 1297.
38. *Id.* at 1299.
39. 552 F.2d 681 (6th Cir. 1976); Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970). In a recent decision involving the eligibility of college athletes, the Eighth Circuit Court of Appeals found it unnecessary to decide whether there was a property interest in participation in intercollegiate basketball or a liberty interest in players' good names, or both, sufficient to invoke the guarantees of due process. Regents of U. of Minn. v. National Collegiate Athletic Ass'n, 560 F.2d 352, 366-67 (8th Cir. 1977). The court stated that "[t]he correct resolution of this issue is uncertain, although we do note that two courts of appeals have held that participation in school athletics is not by itself a constitutionally protected property interest." *Id.* n.22.
40. 552 F.2d 681 (6th Cir. 1976).
41. Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976) (quoting Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1157-58 (5th Cir. 1970) (citation omitted)).

same result.[42] One tenth circuit district court, while citing the *Brenden* reasoning to find a denial of equal protection, as well as finding sex to be a suspect criteria requiring strict scrutiny, nevertheless acknowledged that the law in the tenth circuit was that the participation itself was not a protected interest.[43]

Teare and *Compagno* broke from this traditional position, and recognized that participation in high school athletics involves a liberty or property interest protected by due process.[44] The court noted the considerable support for the view that such participation is a privilege unprotected by any constitutional principle. But an analysis similar to *Reed* was used to reject the right-privilege distinction, and the court noted *Brenden* as having concluded that a student's interest in participation was significant. However, the court in *Teare* and *Compagno* found *Board of Regents v. Roth*[45] and *Goss v. Lopez*[46] to be persuasive. *Roth* acknowledged that the fourteenth amendment's protection of property extends to those interests created and defined by rules and understandings which stem from state law.[47] *Goss* held that even a temporary suspension from public school infringes on liberty and property interest protected by the due process clause.[48] The court in *Teare* and *Compagno* concluded that participation in high school athletics is a significant part of the program of public education provided by the State of Nebraska, and that in view of *Roth* and *Goss*, the applications of the eligibility rules in these instances were likely to have implicated a property or liberty interest protected by the fourteenth amendment.[49]

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42. Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685 (Ky. App. 1977).
43. Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974).
44. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192 (D. Neb. Sept. 16, 1977); Teare v. Board of Educ., No. CV77-L-190 (D. Neb. Sept. 16, 1977).
45. 408 U.S. 564 (1972).
46. 419 U.S. 565 (1975).
47. 408 U.S. at 577.
48. 419 U.S. at 574-75.
49. Compagno v. Nebraska State School Activities Ass'n, No. CV77-L-192, slip op. at 3; Teare v. Board of Educ., No. CV77-L-190, slip op. at 4.

Compare Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192 (D. Neb. Sept. 16, 1977) *and* Teare v. Board of Educ., No. CV77-L-190 (D. Neb. Sept. 16, 1977) *with* Braesch v. DePasquale, 200 Neb. 726, — N.W.2d — (1978). In *Braesch*, the Nebraska Supreme Court was confronted with this issue in an appeal from a state district court which had specifically found that the right to participate in interscholastic basketball was protected by the due process clause of the state and federal constitutions. The analysis of this question was approached almost exactly as it had been by the

Though *Roth* and *Goss* were of special significance to the court, it would seem that this extension of due process protection was to some extent made possible by building upon the foundation which was established in *Reed* and which was further developed in *Brenden*, even though both were decided on *equal protection* grounds. Perhaps some of those very interests which were distinguished to make *Reed* possible have since been developed so that *Teare* and *Compagno* could merge those interests with the interests recognized in *Roth* and *Goss* to significantly extend due process protections to specific aspects of a student's total education program.[50]

The implicit issue of *access to* as contrasted with *removal from* an educational program or activity may be noted at this point. Although alluded to in *Compagno* in the context of the process due, the question of whether a protected interest exists prior to actual entry into the activity was never specifically confronted; however, these two decisions imply an affirmative answer.

The extensions of due process protections in *Teare* and *Compagno* seem to flow logically from the implications of *Goss*. *Goss* established that a student's entitlement to a public education was a property interest protected by the due process clause, and reaffirmed the view that beyond a *de minimus* deprivation of that interest, the gravity of the deprivation is irrelevant to whether due process must be considered.[51] The Supreme Court

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federal district court in *Teare* and *Compagno*, with the exception that the supreme court stated that "[p]articipation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education." 200 Neb. at 731, — N.W.2d at —. The state district court's finding on the issue was neither affirmed nor reversed; the supreme court went on to consider what process was due under the circumstances, *assuming* that the application of the rule involved implicated a protected property or liberty interest. Id. at 730-32, — N.W.2d at —. *But see* Dallam v. Cumberland Valley School Dist., 391 F. Supp. 358 (M.D. Pa. 1975) (the implications of *Goss* were considered, but it was determined that the protected interest was participation in the entire process of education, not in just a single activity such as athletics).

See also Yellow Springs Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978) (association rule excluding girls from participating in contact sports by playing on boy's teams found to deprive girls of a liberty interest without due process of law); Reisdorff v. Nebraska School Activities Ass'n, No. CV77-0-3 (D. Neb. Jan. 20, 1977) (as a matter of substantive due process, student cannot be arbitrarily or capriciously excluded from participating in an athletic program).

50. Judge Urbom also decided Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972), a significant due process decision which established procedural safeguards when a student's expulsion is being considered.

51. Goss v. Lopez, 419 U.S. 565, 574-76 (1975).

has emphasized that in deciding whether due process requirements apply, the determining factor is not the weight but the *nature* of the interest at stake.[52] Although the academic-disciplinary distinction of *Horowitz* could be read with this to infer that eligibility for an activity might not be a protected interest, *Horowitz* appeared to acknowledge that such interests do exist, but that only minimal due process is required for an academic determination.[53]

An extracurricular activity would seem to be of no greater significance to a student than would any academic or vocational course. If *Teare* and *Compagno* recognize an interest sufficient for the invocation of due process protection in athletic participation, then there should be an interest of comparable importance in having access to and remaining in those particular courses, activities, and programs which a student believes to be of special personal value. However, the impact of such a selective application of due process to student qualification and placement in special programs and services would be tempered by the minimal procedures apparently allowed by *Horowitz* in academic situations. These decisions do indicate that school officials who may have to decide to deny a student admittance to or suspend or exclude a student from any class or activity should provide at least minimal due process, such as making the rules of admittance or removal available to students.

B. The Process Due

Having determined that interests protected by the due process clause of the fourteenth amendment were implicated, the court turned to the question of what process was due under the circumstances in each case. The Supreme Court's acknowledgment of the flexible nature of due process[54] and the summary of relevant due process considerations given in *Mathews v. Eldridge*[55] were noted:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[56]

52. *Id.* at 575.
53. *See* Board of Curators v. Horowitz, 98 S. Ct. 948, 952 (1978).
54. *See* Morrisey v. Brewer, 408 U.S. 471, 481 (1972).
55. 424 U.S. 319 (1976).
56. *Id.* at 334-35.

The specific procedural safeguard involved in both *Teare* and *Compagno* was advance notice of the terms of the applicable eligibility rule. "[A] reasonably accessible means of becoming aware of the applicable rule is an essential element of due process."[57] The court further declared that "[o]ne of the fundamental requirements of fairness implicit within due process is 'warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.' "[58]

With these dictates of due process as guides, the circumstances of each case were considered. The relative responsibilities of the student and the school or association were regarded as determinative.

Teare argued that the advance notice of the rule that he received—publication in and distribution of the student handbook—was inadequate.[59] The court rejected this argument, concluding that Teare was on notice of the existence of eligibility requirements and had reason to know of the student handbook and of its uses. "Through the exercise of reasonable diligence in protecting his own interests, he could have readily learned the terms of the eligibility rules."[60]

Teare's argument that due process required the school to give him notice at the time the contingency which resulted in his ineligibility occurred was also rejected.[61] The court believed that the three-factor analysis of *Mathews* counseled against imposing that additional burden on the school officials. First, although the private interest involved was significant, it was not a critical one entitled to the scrupulous protections afforded more precious interests. Second, since the operation of the previous semester rule was one of eligibility rather than discipline, and since the rule could have been applied by easy reference to objective criteria, the additional safeguard would have been of limited value; furthermore, if Teare would have made the effort to inform himself, he would have had no need of further notification by the school of his ineligibility. Third, "a requirement that a school or athletic association notify each student every time an eligibility rule threatens adverse consequences does impose significant administrative burdens."[62] Because the lim-

57. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 3; Teare v. Board of Educ., No. CV77-L-190, slip op. at 5.
58. Wright v. Arkansas Activities Ass'n, 501 F.2d 25, 29 (8th Cir. 1974) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).
59. Teare v. Board of Educ., No. CV77-L-190, slip op. at 3.
60. *Id.* at 5.
61. *Id.* at 5-6.
62. *Id.* at 6.

its of such a rule would be difficult to predict, a school should not be obligated by due process to warn a student whenever a rule or requirement might adversely affect an educational interest.[63]

The *Teare* analysis can be summarized as follows: (1) an advance notice of an activity eligibility rule by way of a student handbook is probably sufficient; and (2) a balancing of the student's responsibility with the school's administrative burden indicates that due process does not require a school to notify a student every time the student's conduct results in a threat to that student's own interests.

Compagno's due process claim was analyzed in essentially the same manner as Teare's, although the facts were significantly different.[64] In *Compagno* no written eligibility rule was placed in the possession of the student until after his ineligibility was established; furthermore, the written rule was vague, and an ordinarily perceptive student was unlikely to interpret it as requiring the parents to reside in the public school district in which the parochial school being attended is located. Nevertheless, it was determined that there was no denial of due process, at least under the evidence presented.[65]

The rule confronted was "a rule of eligibility in a voluntary activity"[66] and was applied to one not previously eligible; no "eligibility or other expectation of participation which he had acquired by previous participation" was being denied.[67] To have been useful, the accepted interpretation of the residency rule would have had to have been known to Compagno before his family moved to Omaha or before he enrolled in school.

> As a practical matter, it would have been virtually impossible for the association to have given him notice of the rule before both these acts occurred. Under these conditions, the initial burden of attempting to learn of rules of eligibility lay upon the student, rather than upon the school or the association.[68]

If Compagno had attempted to learn of the rules, the inquiry probably would have resulted in his receiving either the written rule itself or an interpretation of the rule; under the evidence presented it was wholly speculative which he would have received. What was significant was the absence of any evidence to

63. *Id.*
64. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 2-3.
65. *Id.* at 3.
66. *Id.*
67. *Id.* at 3-4.
68. *Id.* at 4.

show that Compagno had made any attempt to learn of the rules before establishing residence and enrolling in school or whether such an attempt would have obtained the association's interpretation.[69]

The issue of the vagueness of the rule was never specifically reached; however, had an attempt been made to obtain the information, Compagno could have claimed that he had met his burden, but that the school and the association had not met theirs.

> If a full and accurate interpretation would not have been received upon reasonable inquiry, futility of the attempt would be established. On the other hand, if a full and accurate interpretation would have been given upon a reasonable inquiry, the failure to inquire, not the vagueness of the rule, was the cause of Vincent's ineligibility.[70]

Compagno indicates that the initial burden to learn of any residence requirements is on the student seeking to participate for the first time in a voluntary extracurricular activity, provided that the rules are reasonably accessible. Accessibility can depend upon whether the actual meaning is likely to be obtained upon inquiry of a convenient source.

The analysis of notice requirements in *Teare* and *Compagno* would appear to comport with that in *Regents of University of Minnesota v. National Collegiate Athletic Association*,[71] in which the application of eligibility rules to college athletics was considered by the Court of Appeals for the Eight Circuit:

> [T]he Association rules under which the student-athletes were charged do not by their own terms require any actual knowledge of the infraction. In this, there is no constitutional infirmity. Although due process does require that lawful punitive action can only be imposed where fair notice has been given . . . . there is no general requirement, even in criminal cases, that the charged party actually knew at the time of the offense or infraction that the conduct was proscribed.[72]

It might be concluded from these decisions that although the eligibility rules must be made reasonably accessible, the student-athlete has the responsibility to learn of them.[73] Further-

69. *Id.*
70. *Id.* n.3.
71. 560 F.2d 352 (8th Cir. 1977).
72. *Id.* at 369.
73. A state appellate court came to this same conclusion in a recent eligibility case. Dumez v. Louisiana High School Athletic Ass'n, 334 So. 2d 494 (La. App. 1976) (writ refused). The court determined that the placement of posters displaying eligibility rules in prominent locations about the school satisfied the due process requirement of reasonable notice, and that it was not necessary that a rule book be furnished each student. However, the court did state that "it is essential that they do advise students of a rule where the violation of that rule imposes a penalty and if the manner of

more, even if the student does not know of the rules, that fact in itself does not invoke the protection of the due process clause to prohibit the operation of the rules.

The analysis of the process due in *Teare* and *Compagno* is appropriate in view of *Goss v. Lopez*.[74] The opinion of the Court in *Goss* emphasized a sense of fundamental fairness and the need for due process protections in student disciplinary suspensions.[75] The *Goss* dissent expressed concern with both the extra burden due process considerations would place on school officials and the detrimental effect of such procedures on the essential inculcation in each pupil of an understanding of the need for rules and adherence thereto.[76]

Although the actual analysis seems to follow the flexible three-factor balancing approach to due process, as did *Teare* and *Compagno, Board of Curators v. Horowitz*[77] emphasized the distinctions between disciplinary proceedings and academnic evaluations in determining what process is due.[78] Disciplinary decisions, such as in *Goss*, involve disputed issues of fact and some form of hearing is a protection against error; academic judgments are more subjective and evaluative, and therefore less reliant on factual determinations. Furthermore, the educational process is centered on a continuing student-teacher relationship, and this relationship might be harmed if academic evaluations were subject to the type of hearing that the adversary nature of a disciplinary suspension requires.[79]

It should be noted that neither *Teare* nor *Compagno* involved a hearing.[80] Notice and an opportunity to be heard are

notice is through a poster, then it behooves the student athlete to inform himself accordingly." *Id.* at 502.

74. 419 U.S. 565 (1975).
75. *Id.* at 580-81.
76. *Id.* at 584.
77. 98 S. Ct. 948 (1978).
78. *Id.* at 952-55.
79. *Id.* at 955.
80. The Nebraska School Activities Association has a due process procedure for notice, hearing, and review to be followed in the event of an alleged infraction of the association's constitution, by-laws, or approved rulings. *See* NEBRASKA SCHOOL ACTIVITIES ASS'N, *supra* note 4, at 12-13. Since there was no alleged infraction, this procedure was not used. Article VI, section 1(6) of the constitution of the association provides that "the Board of Control shall have the authority to set aside the effect of any eligibility rule upon an individual student when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student." *Id.* at 10. Both Teare and Compagno did make application for a hardship exception ruling. Teare's application was denied by the Board of Control; Compagno's application had not yet been con-

fundamental requisites of due process when "[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process, with all its unfortunate consequences."[81] It can and probably should be inferred that if a declaration of ineligibility is contemplated which would rest on a contested factual issue, then a due process hearing which would meet at least the minimal standards if not the "more formal procedures" of *Goss* should be provided.[82] However, this may be necessary only in the context of discipline; if the question of eligibility can be categorized as an academic determination, then even if disputed factual issues are involved, *Horowitz* implies that no hearing is necessary.[83]

The academic-disciplinary distinction made in *Horowitz*, though seemingly a definitive starting point for an analysis of what process is due, may be extremely difficult to apply in many situations. One of the purposes of education is to teach appropriate conduct and discipline is often used to promote good study habits and academic achievement.

How should the question of eligibility for athletic participation, such as in *Teare* and *Compagno*, be classified? Although Teare rather clearly ran afoul of an academic standard, is the operation of the *previous* semester rule intended to provide more time and attention for academic pursuits, or is it punishment intended to discourage poor study habits? What of the student who fails to meet a school's standard of "good citizenship" as a prerequisite to participation?[84] The residency rule that Compagno unknowingly violated would seem to have as its purpose the prevention of athletic recruitment in the secondary schools. Does this involve an educational issue of regulating participation in activities, or is it a punitive measure intended to discourage a form of misconduct on the part of either a school or a student? Does the fact that the adversary is a state activities association rather than the student's school negate the concern of the court for preserving the normal student-teacher relationship? Such questions do not lend themselves to categorical an-

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sidered at the time of the district court's decision. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192, slip op. at 2; Teare v. Board of Educ., No. CV77-L-190, slip op. at 3. The use of this hardship exception procedure would be a step toward compliance with the limited due process standard that *Horowitz* requires in the academic evaluation context.

81. Goss v. Lopez, 419 U.S. 565, 579 (1975).
82. *Id.* at 584.
83. 98 S. Ct. at 952-55.
84. Such a provision was in the handbook given Teare. Teare v. Board of Educ., No. CV77-L-190, slip op. at 2.

swers. Educational issues involving elements of both discipline and academics are common.

Perhaps *Horowitz* can be of most value if read to emphasize the distinction between the more *objective factual* decisions often associated with discipline and the more *subjective comparative* determinations common to academic evaluations.

IV. CONCLUSION

Teare and *Compagno* significantly extend due process protections. First of all, this fourteenth amendment protection is extended to participation in athletics, which has not been considered a constitutionally protected interest. Secondly, due process is extended to a voluntary and extracurricular activity which is only a single part of the total program of education. Finally, they imply that the interest in having access to an educational program or activity is sufficient to invoke the protection of the due process clause.

It is equally significant that *Teare* and *Compagno* place a substantial burden upon the student to protect his or her own interests by assuming the responsibility for knowing of and understanding the rules established and promulgated by the school. The school has a comparable responsibility under procedural due process to make its rules reasonably accessible and understandable. Publication in a student handbook is appropriate notice of regulations.

The flexible three-factor due process analysis in *Teare* and *Compagno* considered the significance of the interests, the chance of error, and the burden of responsibilities in a fair and reasonable manner—and that would seem to be the essence of due process.

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